Petition

81-1226

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

VERNON F. HEPKE - - - - **Petitioner**

versus

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare - - **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 30, 1981

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QUESTIONS PRESENTED FOR REVIEW

1. Whether RESPONDENT'S application of an unconstitutional statute, resulting in the denial of social security benefits to PETITIONER'S family, coupled with PETITIONER'S failure to receive the requisite initial written notice of such determination and with deprivation of his right to a hearing, constitutes that "type of conduct that will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits" under *Schweiker* v. *Hansen,* 101 S. Ct. 1468 (1981).
2. *Whether* the so-called *presumption* of administrative regularity *extends to the mailing* of a written notice of initial determination, denying benefits, to PETITIONER *and to receipt* of such notice by PETITIONER as well, when the result of failure to so receive the notice deprived him of a due process hearing.

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IN THE

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October Term, 1981

No.

VERNON F. HEPKE - - - - *Petitioner*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, VERNON F. HEPKE ("PETITIONER"),[1] prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on August 19, 1981, a rehearing of which was denied by said Court on October 5, 1981.

OPINIONS BELOW

The final judgment and opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter, for sake of brevity, Sixth Circuit), entered

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[1]All official parties to the proceeding are named in the caption. It is undisputed, however, that PETITIONER represents the interests of the four children born of his marriage to the deceased female wage earner, DOROTHY M. HEPKE.

on August 19, 1981 is not officially reported[2] but appears in the Appendix hereto as App. 1. The order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc,* entered October 5, 1981, is not reported but appears in the Appendix hereto as App. 2. The Mandate of the Court, dated December 9, 1981, is not officially reported but appears in the Appendix as App. 3. Also included in the Appendix as App. 4 is the unreported decision of the United States District Court for the Western District of Kentucky dated January 18, 1980, as amended by final order dated February 20, 1980 (App. 5) and the unreported decision of the Administrative Law Judge, as adopted by RESPONDENT, dated October 31, 1978 (App. 6).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

- *United States Constitution*
  - *Fifth Amendment*

"No person shall . . ., be deprived of life, liberty, or property, without due process of law; . . ."

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[2]The opinion is reported in Sixth Circuit Review, Vol. 10, No. 22 (September 18, 1981), pp. 15-16.

STATUTES AND REGULATIONS INVOLVED

- *United States Statutes*
  - *42 U.S.C. §402(d)(1)*[3]
  - *42 U.S.C. §402(d)(3)*[3]
  - *42 U.S.C. §402(d)(5)*[3]

Due to the length of said statutory provisions, they are reproduced collectively in the Appendix as App. 7.

- *Federal Regulations*
  - *20 CFR §404.907*
  - *20 CFR §404.908*
  - *20 CFR §404.909*

Due to the length of said regulations, they are reproduced collectively in the Appendix as App. 8.

STATEMENT OF THE CASE

This matter is a request for relief from the final judgment of the United States Court of Appeals for the Sixth Circuit, from which a Petition for Rehearing was denied. Jurisdiction in the court of first instance was founded upon the provisions of 28 U.S.C. §1331, 28 U.S.C. §2201 and by virtue of 42 U.S.C. §405(g).

A full understanding of the salient facts, over which there is no dispute, is necessary to appropriate dispo-

[3]As said statutes existed in 1967, prior to enactment of Pub. L. 90-248, §151, 81 Stat. 860, effective January 2, 1968, which enactment removed the constitutional impediment of 42 U.S.C. §402(d)(5) and placed children of female wage earners on a parity with those of male wage earners.

sition hereof. At issue is the legal significance and conclusions to be drawn therefrom.

DOROTHY M. HEPKE, the deceased female wage earner, was, at the time of her death on October 22, 1967, married to PETITIONER, and they resided in the same household with their four minor children, namely, SHARON, born June 9, 1951; VERNON, born August 22, 1953; CATHERINE, born August 22, 1955 and LEA ANN, born September, 1959.

On or about October 30, 1967, PETITIONER and his adult daughter, JANICE TOWNSEND, appeared at the Social Security office in Louisville, Kentucky to file for the "burial allowance" [Lump Sum Death Benefit provided by 42 U.S.C. §402(i)] and benefits for the children, at the funeral director's suggestion. They spoke with an unidentified representative, described as "a man in his mid-forties with greying hair and wearing a white shirt." The representative brought out some papers and started asking questions of PETITIONER. Among the questions posed were: PETITIONER'S name and social security number; DOROTHY'S name, social security number and place of birth; and identity of their children and ages. All answers to the questions were provided by PETITIONER and were written on the form in the representative's possession.

The question and answer session lasted 10-15 minutes, whereupon the representative departed, walked to the rear of the building and ultimately returned in 10-15 minutes. He told PETITIONER, "Well sorry,

you're a quarter short."[4] Not understanding what that meant, PETITIONER requested a recheck because of the fact that DOROTHY had worked quite a bit before and after their marriage. The representative left for a few minutes and returned with the same response, "You're a quarter short."

Although all of the information was inserted on the official forms, the representative never asked PETITIONER to sign them, and PETITIONER did not ask to sign them because "when he said I wasn't entitled, I just figured that was it . . ." The representative never advised PETITIONER of any right of redetermination or of any appeal rights that may have existed.

Following the conference, PETITIONER received neither written notice of the claim disallowance nor written notification of any appeal rights to the representative's oral determination.[5] In response to inter-

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[4]DOROTHY'S wage earnings record reflected that she was "fully insured", having 29 quarters of coverage but needing only 16. She was not "currently insured", however, for she lacked the requisite 6 covered quarters within the 13 quarters prior to and including the quarter in which she died [App. 6, p. 40]. See Appendix 7.

[5]RESPONDENT'S records "show that some kind of application was filed on October 30, 1967, based upon the wage record of Dorothy M. Hepke . . . [T]he file pertaining to such claim was sent to the Federal Records Center in February, 1979, and such records were destroyed in May, 1974." [App. 6, p. 43]. From that fact the RESPONDENT concluded that PETITIONER must have signed one or more applications on October 30, 1967, that there would have been no destruction of the file unless a determination had been made and that "it follows that in the course of dis-

(Footnote continued on following page)

rogation by the Administrative Law Judge at the hearing, PETITIONER unequivocally stated that he never received anything from Social Security!

In 1977, a discussion between PETITIONER and one of his daughter's teachers precipitated PETITIONER'S filing of an application for lump sum death benefit and for children's benefits. The claims were denied, the request for redetermination was rejected and following a hearing before the Administrative Law Judge, the decision adverse to PETITIONER was affirmed by the Appeals Council, thereby becoming the decision of RESPONDENT.

Review of the decision was presented to the District Court, following which summary judgment was granted in RESPONDENT'S favor. In the course of the memorandum, Judge Ballantine opined: (i) that the questions raised were novel ones, at least for the Western District of Kentucky; (ii) that administrative agencies are entitled to the presumption that they act properly and according to law, and that based thereon, Social Security Administration denied the claim, the denial became final and the records were properly destroyed; (iii) that the Act (42 U.S.C. §402) as written on October 22, 1967 was unconstitutional. App. 4, pp. 29, 31; App. 5, p. 36.

PETITIONER appealed to the United States Court of Appeals for the Sixth Circuit, which Court,

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(Footnote continued from preceding page)

position of the application filed on October 30, 1967, the claimant *would have received* a written notice of the determination . . ." [App. 6, p. 42]. Emphasis added.

on August 19, 1981, affirmed the judgment of the District Court. In so doing, the Court observed that "[A]s obvious as it appears from the above recital of fact that an unconstitutional deprivation of social security rights has occurred, the difficulties of providing any remedy at this point are many" [App. 1, p. 24]. The Court, notwithstanding recitation of the matters set forth in the Social Security records,[6] dealt the death knell to PETITIONER's claim by reliance upon the single statement made by PETITIONER in 1977 to the effect that a prior application for children's benefits had not been filed.

Following the August 19, 1981 decision, PETITIONER seasonably filed a Petition for Rehearing therefrom, which Petition was denied on October 5, 1981. The within Petition for a Writ of Certiorari is timely filed, pursuant to Rules 20.2 and 20.4 of this Court and 28 U.S.C. §2101(c).

REASONS FOR GRANTING THE WRIT

I. The Legal Significance Attached by the Sixth Circuit to the Unconstitutional Nature of 42 U.S.C. §402(d), as It Existed on October 22, 1967, Is Not in Accord With Previous Decisions of This Court or of Other Courts of Appeal.

In speaking to the issue of gender-based distinctions created by the Social Security laws, this Court stated:

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[6]See footnote 5, *supra*.

> ". . . the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection *for their families* than is provided by the efforts of men." *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975), at 645. Emphasis added.

See, also: *Califano* v. *Goldfarb,* 403 U. S. 199 (1977); *Califano* v. *Westcott,* 443 U. S. 76 (1979).

The decisions of this Court, with particular emphasis upon *Wiesenfeld* and its progeny, teach us that survivors' benefits are a matter of right, related to past participation in the productive process of this country. Based upon the unconstitutional nature of 42 U.S.C. §402(d), as applied to PETITIONER in 1967, and as so found by the prior courts confronted with the issue, those benefits cannot summarily be set aside. As stated in *Richardson* v. *United States,* 465 F. 2d 844 (3rd Cir. 1972), reversed on other grounds, 418 U. S. 166 (1974):

> ". . . if a law is unconstitutional, it is void and of no effect, and it cannot alter an otherwise valid obligation of a government officer to a citizen . . ." 465 F. 2d at 850.

Cf., *Norton* v. *Shelby County,* 118 U. S. 425 (1886) at 442. *McDonald* v. *Department of Public Welfare of State of Fla.,* 430 F. 2d 1268, 1269-70 (5th Cir. 1970).

II. The Legal Significance Attached by the Sixth Circuit to Petitioner's Statement That He Did Not File an Application for Children's Benefits Prior to 1977 Is in Conflict With Previous Decisions of This Court and of Other Courts of Appeal.

• *Assuming, Arguendo, That No Application Was Signed, Such Is Not Fatal to Petitioner's Claim.*

The Sixth Circuit Court of Appeals attached a "dispositive" label to the negative response made by PETITIONER to the 1977 inquiry whether he had ever before *filed* an application for children's benefits. Such conclusion was drawn without reference to the 1967 oral denial of benefits, based upon an unconstitutional act and without reference to the existence and later destruction of Social Security records.

In *Weinberger* v. *Wiesenfeld, supra,* this Court implicitly and tacitly approved the concept herein espoused by acknowledging the existence of an oral request for and oral denial of benefits, 420 U. S. at 640, n. 6; *Wiesenfeld* v. *Weinberger,* 367 F. Supp. 981 (D.C. N.J. 1973) at 985, n. 5, and yet refused to further deprive applicant of those benefits because of the unconstitutionality of the statute. That concept has met with judicial acceptance in other courts. *Crumpler* v. *Califano,* 443 F. Supp. 342, 347 (E.D. Va. 1978); *Griffin* v. *Richardson,* 346 F. Supp. 1226, 1237 (D.C. Md. 1972), aff'd., 409 U. S. 1069 (1972).

• *The Sixth Circuit's Refusal To Reconsider Any Evidence Beyond The Single Statement Represents Substantial Departure From the Accepted and Usual Course of Judicial Proceedings As They Relate To The Substantial Evidence Rule.*

Notwithstanding the well established standard established by the Sixth Circuit in its review of social security cases,[7] its decision in the matter at bar represents a radical departure therefrom. One cannot lose sight of the fact that the benefits sought are solely for his children—benefits of which they have been deprived solely because of an act unconstitutionally applied and based upon an invidious class distinction. *Califano* v. *Goldfarb, supra,* 430 U. S. at 209.

Yet the Sixth Circuit has applied an equitable estoppel against these children, premised solely upon the purported legal effect of the single statement. Considering the conclusory nature of that utterance, however, the erroneous understanding or "sin" of the father should not be visited upon his children. *Dir., Office of Wkrs.' Comp., Etc.* v. *Nat. Van Lines, Inc.,* 613 F. 2d 972, 974 (D.C. Cir. 1979). As that principle applies to social security cases, *Rasmussen* v. *Gardner,* 374 F. 2d 589 (10th Cir. 1967) explicitedly states that children of a lay person *cannot* be penalized by his ignorance:

> "If the facts and circumstances indicate that a claimant is entitled to benefits, he should not be penalized by his former position, which may be nothing more than a misapprehension of the law.

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[7] ". . . We may not focus and base our decision entirely on a single piece of evidence and disregard other pertinent evidence . . ." *Hephner* v. *Matthews,* 574 F. 2d 359, 362 (6th Cir. 1978). Cf., *Johnson* v. *Califano,* 607 F. 2d 1178, 1180 (6th Cir. 1979).

> It should also be borne in mind that a portion of the claim here made is for the children's benefit. Their position should be determined by what the facts really were relative to their parents' earnings, and not by the opinion of one of them." 374 F. 2d at 593.

Whether one has *filed* an application is a question of law, yet the Sixth Circuit has opted to isolate from the myriad of facts contained in RESPONDENT'S records a single answer to a single question. *Inter alia,* it has failed to consider the testimony of the corroborating witness [App. 6, p. 39]. It has failed to consider findings of administrative regularity concerning creation of a record in October, 1967 and its ultimate destruction. Of greatest significance was its failure to recognize that PETITIONER'S inability to *sign* the forms in 1967 was due to but one overriding consideration—an unidentified representative's correct application of an unconstitutional statute in orally denying benefits.

Such isolation of the single statement is alien to all accepted standards of jurisprudence in a case of this nature and represents an unacceptable alternative to the substantial evidence rule.

III. The Presumption of Administrative Regularity That Was Afforded Respondent Is in Conflict With Previous Decisions of This Court, of Other Courts of Appeal and of Kentucky's Court of Last Resort.

The attempt or failure by the Sixth Circuit to ascertain a legal or factual basis for reconstruction of

RESPONDENT'S records [App. 1, p. 25] has created an abyss from which there is no escape, for, as stated by the Administrative Law Judge, only "those claims that have adjudicated (where an application has been filed and a final determination made) are sent to the Federal Records Center." App. 6, p. 42.

PETITIONER therefore was confronted with the proposition, based solely on inference, that: (i) an application was filed; (ii) the application for benefits was denied; (iii) if benefits were denied, notice thereof was mailed; and (iv) if benefits were denied and notice thereof was mailed, such notice was received.[8] But for the filing of the application (based upon the existence and later destruction of the record) all other inferences are posited solely upon the overbroad and trite presumption of governmental regularity, culled from *FCC* v. *Schreiber,* 381 U. S. 279 (1965).[9] Such are not the facts, and the presumption was misapplied, to PETITIONER'S consummate detriment.

• *Written Notice Of The Determination Is Mandated By Regulation And Is Constitutional In Nature.*

20 CFR §404.907 places a mandatory burden on the Social Security Administration to mail written notice of an initial determination to the party thereto at his

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[8] "Thus, it follows in the course of disposition of the application filed on October 30, 1967, the claimant *would have received* a written notice of the determination." [App. 6, p. 42]. Emphasis added.

[9] ". . . the presumption to which administrative agencies are entitled—that they will act properly and according to law." 381 U. S. at 296.

last known address *and* to inform the party of his right to reconsideration of that determination. App. 8, p. 48.

The obvious importance of the written notice is its finality and binding effect upon a claimant and his minor children, as unequivocally provided by 20 CFR §404.908. App. 8, p. 49. It is appodictic, therefore, that absent transmission or receipt of that written notice, there can be no reconsideration of the determination.

The aforesaid notice requirements are constitutional in nature, and PETITIONER could not waive that of which he had no knowledge. In that the notice of initial determination is required in the event of disallowance, reduction or adjustment of benefits, the reasoning of this Court in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970) is apposite to PETITIONER'S rights herein. He was constitutionally entitled, at all times, to a Fifth Amendment due process hearing on his claims. 20 CFR §404.909. App. 8, p. 49.

• *RESPONDENT Was Not Entitled To Any Presumption That Notice Was Sent.*

A presumption that public officers have done their duty is not a substitute for substantial fact. *United States* v. *Ross,* 92 U. S. 281 (1875), and standing alone, cannot form the basis for denial of benefits. The presumption that notice was sent is speculation, at best, and it cannot replace a requisite definite and material fact. *Shanks* v. *Northcutt,* 223 Ky. 138, 3 S. W. 2d 208 (1928).

In *Atteberry* v. *Finch,* 424 F. 2d 36 (10th Cir. 1970), the Tenth Circuit was confronted with a district court

ruling that the Secretary's decision denying benefits was not supported by substantial evidence because it did not show that the Secretary had given notice of the denial, as required by 20 CFR §404.907. Factually, Atteberry testified that when an application was filed an unidentified employee told him that he was ineligible for disability benefits because he earned too much money. That oral statement was the extent of notification, as Atteberry further stated that he received no letter notifying him of disallowance or of his right to reconsideration.

The Secretary, in *Atteberry,* argued that a sheet of paper containing claimant's name, address, a date and certain code numbers was, in fact, a form of the claim allowance and although the only matter in the record, was sufficient evidence of mailing. In affirming the district court decision, the Tenth Circuit stated:

> ". . . The record does not show that the examiner knew the contents of the letter, and is silent as to the basis of the finding of adequate notice. To sustain this argument the Secretary would be permitted, after commencement of court action, to supply evidence on the critical issue in the case. *In this case the existence of a statutory notice would be established without any actual proof thereof. We think this is contrary to orderly court review procedures in such case . . .*" 424 F. 2d at 39. Emphasis added.

• *RESPONDENT Was Not Entitled To Any Presumption That Notice Was Received.*

The only direct proof in the record concerning receipt of written notice was submitted by PETITIONER to the effect that he received nothing from Social Security. As earlier noted, however, the Administrative Law Judge concluded otherwise, relying solely on administrative regularity (and implicit trust in the postal system, no doubt).

The one inference, however, that cannot withstand judicial scrutiny is receipt of notice. As a matter of law, one is not entitled to a presumption of receipt unless and until there is *direct proof* that the item was mailed in the first instance. This is the law of the Sixth Circuit, *Simpson* v. *Jefferson Standard Life Insurance Company,* 465 F. 2d 1320 (6th Cir. 1972), and this is the law of Kentucky's highest court (now our intermediate appellate court), *Brown* v. *Union Central Life Ins. Co.,* 241 Ky. 514, 44 S. W. 2d 514, 516 (1931).

There being not one shred of direct evidence to support RESPONDENT'S finding that written denial was mailed, let alone received, the Sixth Circuit's affirmation of the finding of receipt represents the most blatant example of departure from its own teachings. We invite this Court's attention to *Crown Cork & Seal Co.* v. *Morton Pharmaceuticals, Inc.,* 417 F. 2d 921 (6th Cir. 1969), wherein the Sixth Circuit, in reviewing a similar situation, rejected the very double presumption concept that it herein has condoned for RESPONDENT'S benefit:

> "The District Court refused to admit the proffered evidence, which consisted of a blank copy of a

> standard form acknowledgment containing the limitation of liability provision and the testimony outlined above concerning Crown's usual procedure in handling orders and sending acknowledgments, because Crown could produce no witness who could testify that an acknowledgment was prepared and mailed for the order for the cans in controversy, while Morton's president testified that it did not receive an acknowledgment for the order for the cans. The District Court's ruling was clearly correct. If evidence that an acknowledgment was prepared and mailed for the cans in controversy had been offered, the jury could have properly inferred that Morton received such acknowledgment. Here, however, Crown was asking the Court to permit the jury to infer first, that an acknowledgment was prepared and mailed for this particular order because one was normally prepared and mailed in the ordinary course of business, and second, that Morton received such acknowledgment. As the District Court correctly pointed out, this would require an impermissible inference that the acknowledgment was received by Morton to be based on an inference that it was sent . . ." 417 F. 2d at 925-6.

The instant case represents the classic example of a true pyramid—presumption and inference piled on top of presumption and inference. Such pyramid built on inferences, however, is foreign to the basic rules of evidence. *Tyrrell* v. *Dobbs Investment Co.*, 337 F. 2d 761, 765 (10th Cir. 1964); *Klingenfus* v. *Dunaway*, Ky., 402 S. W. 2d 844 (1966). The Sixth Circuit's acceptance of presumption at the expense of the direct

evidence to the contrary is an explicit violation of its obligations of appellate review, and its impact is devastating in light of *Atteberry* v. *Finch, supra.*

IV. This is a Case of First Impression—the Combination of Facts and Circumstances Herein Presented Constitutes the Type of Conduct, Through Act and Omission, Necessary to Estop the Government From Denying Benefits, Under *Schweiker* v. *Hansen*.

On April 6, 1981, this Court handed down its *per curiam* decision in *Schweiker* v. *Hansen*, —— U. S. ——, 101 S. Ct. 1468 (1981), perhaps[10] putting to rest the question whether one may be denied retroactive benefits by reason of the simple negligence of a social security field representative in failing to advise the applicant of the advantages of filing a written application. In substance, the decision was limited to the holding that the Secretary could not be estopped from insisting upon compliance with a valid regulation (filing of a written application), based upon the failure of an agent to follow instructions set forth in the 13-volume SSA Claims Manual. Yet unanswered and so acknowledged by the majority is "what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." 101 S. Ct. at 1470.

The uniqueness of the issue at bar is patent when one considers that involved herein was oral denial of

[10]A vigorous dissent was filed by Mr. Justice Marshall, in which dissent Mr. Justice Brennan concurred.

benefits based upon application of a statute inherently unconstitutional and so declared, a subsequent amendment to that statute removing the constitutional impediment[11] and the absence of written notice of the determination or receipt thereof.

The foregoing factors heretofore have been singularly considered by a number of courts, but never as a "package." Cf., *Weinberger* v. *Wiesenfeld, supra* and *Crumpler* v. *Califano, supra,* on the question of oral applications and retroactive benefits; *Atteberry* v. *Finch, supra,* on the question of notice; *Chevron Oil Co.* v. *Huson,* 404 U. S. 97 (1971) and *Hurwich* v. *Califano,* 457 F. Supp. 760 (N.D. Cal. 1978) on the question of retroactivity after an amendment is enacted.

The matter at bar represents a prime opportunity for this Court to determine whether denial of benefits, without written notice, premised upon the unconstitutionality of a statute, constitutes sufficient prohibited conduct to warrant estoppel. It affords this Court a prime opportunity to distinguish between the general

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[11]We would suggest to the Court that unlike *Hansen,* in which the field representative erroneously informed applicant that she was ineligible for benefits, perhaps because he was unfamiliar with a recent amendment, 101 S. Ct. at 1471, had PETITIONER received the written notice, the necessity for reconsideration under 20 CFR §404.909 would have become a moot point, because the amendment became law 64 days after PETITIONER'S visit to the SSA office. Thus, instead of seeking reconsideration, he could have filed another application at any time within the twelve month period following January 2, 1968 and received no less than full benefits from and after that date. 42 U.S.C. §402(j). This would have been true notwithsanding the unconstitutionality of 42 U.S.C. §402(d) prior thereto.

"duty of all courts to observe the conditions defined by Congress for charging the public treasury" *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 385 (1947) and the specific de minimis non curat lex effect[12] of retroactive benefits paid to survivors from the Social Security trust fund after a finding of unconstitutionality, particularly when the survivor benefits are "a matter of right." *Wiesenfeld, supra,* 420 U. S. at 646.

PETITIONER'S reliance upon the oral denial of benefits, after filling out the form in 1967, is beyond cavil. That oral denial was not the result of negligence or ignorance on the agent's part, as in *Hansen.* The failure to receive written notice was not a matter of negligence, but one of failure to follow validly enacted regulations and procedures. Cf., *Morton* v. *Ruiz,* 415 U. S. 199, 235 (1974). The destruction of the records was predicated upon the unconstitutional classification that PETITIONER was entitled to no benefits. If these issues are to be put to rest and an answer provided to the question posed in *Hansen,* the matter at bar represents the appropriate vehicle for so doing.

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[12]Cf., *Cash* v. *Califano,* 621 F. 2d 626 (4th Cir. 1980); *Jimenez* v. *Weinberger,* 523 F. 2d 689, 702-704 (7th Cir. 1975), cert. denied, 427 U. S. 912 (1976); *Hurvich* v. *Califano, supra; Crumpler* v. *Califano, supra; Novak* v. *Harris,* 504 F. Supp. 101 (E.D. N.Y. (1980).

CONCLUSION

For any one or all of the reasons hereinabove set forth, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

ALFRED S. JOSEPH, III
KENNETH S. HANDMAKER
MIDDLETON & REUTLINGER
501 South Second Street
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(502) 584-1135

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of this Court, it is hereby certified that three (3) copies of the within Petition for Writ of Certiorari were served upon the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of Respondent, and upon Stanley Ericsson, Esq., Office of the General Counsel, Department of Health and Human Services, 6401 Security Boulevard, Baltimore, Maryland 21235, Attorney for Respondent, by depositing same in a United States mailbox, with first-class postage, certified mail with return receipt requested, prepaid, on this December 30, 1981.

It is further stated that Respondent, Secretary of Health and Human Services (formerly Secretary of Health, Education and Welfare), the only party required to be served, has been served as hereinabove set forth.

Counsel for Petitioner

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APPENDIX 1

No. 80-3226

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VERNON F. HEPKE, - - - - *Plaintiff-Appellant,*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare, - - *Defendant-Appellee.*

APPEAL from the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed August 19, 1981.

Before: EDWARDS, Chief Judge, LIVELY and JONES, Circuit Judges.

PER CURIAM. The wage earner in this case, Dorothy Hepke, died October 22, 1967, survived by her husband Vernon and four minor children. At the time of her death, although she was fully entitled to social security benefits as a result of her own employment, her children were not eligible for child insurance benefits under the Social Security Act as it was then written. At the time in question, however, if it had been Vernon Hepke who died, they would have been entitled to such insurance. *See* Social Security Act Amendments of 1950, ch. 809, § 101, 64 Stat. 484. The obvious sex discrimination involved in this situation was dealt with by Congress two months after Dorothy Hepke's death by the enactment of an amendment to the Social

Security Act. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, § 151, 81 Stat. 860 (codified at 32 U.S.C. § 402(d) (1976)). This amendment took effect at a time when all four of Dorothy Hepke's daughters were still of an age when they were eligible for benefits.

As obvious as it appears from the above recital of fact that an unconstitutional deprivation of social security rights has occurred, the difficulties of providing any remedy at this point are many. The first and perhaps the dispositive one is that the application which we deal with here was filed January 24, 1977, over nine years after Dorothy Hepke's death, and on that application, Vernon Hepke responded "no" to the question, "Has anyone ever before filed an application with the Social Security Administration for monthly benefits on behalf of any child in item 13?"

Hepke did append a statement saying that in October 1967, he had gone to the Social Security Administration office to file an application, and had spoken with a representative who, according to Hepke, "left for a few minutes, and when he came back he told me my wife had not paid in enough quarters for any payment to be made. He did not take a claim." Hepke filed the instant application seeking lump sum death benefits for himself and child insurance benefits for his youngest daughter.

The concern of the Administrative Law Judge who heard this case is obvious in the following paragraph from from his decision rendered October 31, 1978, which became the final decision of the Secretary and parallels that of the District Court.

> The claimant's lack of knowledge of the change in the law pertaining to the child's insurance benefits, in January 1968, resulted in a great loss of benefits to his four minor children. For this reason, the undersigned has agonized over the conflict between the claimant's

> statements of what transpired on October 30, 1967 and the written evidence and procedures of the . . . Administration in handling such claims. Although the claimant states that he did not file any application or sign anything when he talked to the social security representative in October 1967, the evidence shows that an application was filed on October 30, 1967, was sent to the Federal Records Center in February 1969, and was destroyed in May 1974.

The only pertinent findings of fact before us hold in effect that no application for child insurance benefits was filed until nine years after the date of death. We recognize that appellant's counsel argues vigorously that we should deduce entitlement from the fact that social security records show that some sort of application pertaining to Mrs. Hepke's work record was filed in October of 1967 and was routinely destroyed four years after the 1967 visit of Hepke to the Social Security office. We can, however, find no factual or legal basis for our judicial reconstruction of such record in view of Hepke's own statement that he never filed an application in 1967. It is impossible to say that this statement does not constitute substantial evidence to support the findings of the Secretary.

Under these circumstances, the reasoning of the District Judge which follows appears to us to be dispositive:

> On January 22, 1977, plaintiff filed an application for CIB. . .
>
> To Question 20, "Has anyone ever before filed an application with the Social Security Administration for monthly benefits on behalf of any child in Item 13?", plaintiff responded, "No." (T.R. 62.) Plaintiff mentioned only one child in the CIB application. Under the provisions of Section 202(j), *supra*, the Sec-

retary awarded 12 months retroactive benefits to the child. We again face the inconsistency between plaintiff's unambiguous testimony that he did not file a claim in 1967 and his counsel's assertion that he must have else there would have been no records to be destroyed. The inescapable conclusion which the Court reaches is that no matter what version is correct, plaintiff's infant child has received all the benefits to which she could conceivably be entitled.

Any claim by the other children for CIB would be barred at this time. From the record it appears that none of them has filed an application even as of this date.

The judgment of the District Court is affirmed.

APPENDIX 2

No. 80-3226

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VERNON F. HEPKE, - - - - *Plaintiff-Appellant,*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare, - - *Defendant-Appellee.*

ORDER—Filed October 5, 1981

Before: EDWARDS, Chief Circuit Judge, Lively and Jones, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court

(s) John P. Hehman
Clerk

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3226

VERNON F. HEPKE, - - - - - *Plaintiff-Appellant,*

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, - - - - - - *Defendant-Appellee.*

JUDGMENT—Filed August 19, 1981

Before: EDWARDS, Chief Judge, LIVELY and JONES, Circuit Judges.

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Issued as Mandate: December 9, 1981

APPENDIX 4

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 79-0253-L(B)

VERNON F. HEPKE - - - - - - - *Plaintiff*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare - - - *Defendant*

MEMORANDUM

This is an action to obtain judicial review of a decision of the Secretary denying lump sum death benefits and child's insurance benefits. It is before the Court on cross-motions for summary judgment.

At the outset, it appears that on December 3, 1979, the Court denied the motion by the United States for an extension of time within which to file its memorandum. It appears that this denial was improvidently entered and it is hereby vacated and set aside.

The questions raised in this case are novel ones, at least for this Court. Dorothy M. Hepke died October 22, 1967, survived by the plaintiff, her husband and 4 infant children. About a week after his wife's death plaintiff and one of his daughters went to the Social Security Administration Office in Louisville to inquire about benefits which might be due. According to plaintiff the interviewer asked him a number of questions about his wife and his family. Apparently, the interviewer made notes as plaintiff answered his ques-

tions. After an interview that lasted 10 to 15 minutes the Social Security representative left plaintiff and his daughter and went to a back room. He returned shortly and informed plaintiff that his wife had not been a currently insured individual and, therefore, no benefits were due to plaintiff.

Plaintiff is adamant in his testimony that he signed no forms or other documents at that interview and that he and his daughter left the office convinced that they had no claim for benefits.

Plaintiff did nothing further until January 22, 1977, at which time he filed an application for the lump sum death benefit. On that same day plaintiff filed a claim for surviving child's insurance benefits on behalf of his youngest daughter. Both claims were denied originally and on reconsideration. A request for a hearing before and Administrative Law Judge (ALJ) was granted and the ALJ's determination that plaintiff was not entitled to benefits was approved by the Appeals Council, thereby becoming the decision of the Secretary. This action for review followed.

We will consider the 2 claims separately.

I.

Section 202(i) of the Social Security Act, 42 U.S.C. Section 402(i) provides in pertinent part:

> "Upon the death, . . ., of an individual who died a fully or currently insured individual, an amount equal to three times such individual's primary insurance amount, or an amount equal to $255, whichever is the smaller, shall be paid in a lump sum to the person, if any, determined by the Secretary to be the widow or

> widower of the deceased and to have been living in the same household with the deceased at the time of death.
>
> • • • • • • •
>
> No payment . . . shall be made to any person under this subsection unless application therefor shall have been filed, by or on behalf of such person . . . prior to the expiration of two years after the date of death of such insured individual, ..."

Plaintiff's unequivocal testimony that he did not file an application would seem to be dispositive. The spectre of Joseph Heller's *Catch-22* now rears its head. According to the Social Security Administration, a claim was filed by the plaintiff and denied. Compounding the confusion is the fact that the records of plaintiff's application were routinely destroyed.

Plaintiff argues that the Secretary has taken 2 inconsistent positions. Plaintiff's own argument, however, hoists him by his own petard. If, as he testified, he filed no application in 1967, his 1977 application is time-barred by Section 202(i) of the Act, *supra*. If, on the other hand, as argued by his counsel, plaintiff did file a claim and the Social Security Administration simply mishandled its processing of the claim, plaintiff is confronted with the holding in *FCC* v. *Schreiber,* 381 U.S. 279, 85 S. Ct. 1459 (1965), to the effect that administrative agencies are entitled to the presumption that they act properly and according to law. This presumption dictates that in the absence of evidence to the contrary the Court must find that the Social Security Administration denied plaintiff's claim, that the denial became final, and that the records were destroyed as permitted by the Records Disposal Act, 44 U.S.C. 3301 *et seq.*

The motion of the defendant Secretary for summary judgment on the claim against her for lump sum death benefits will be granted.

II.

We turn next to the claim of the plaintiff for surviving child's insurance benefits (CIB). We do not reach the troublesome question of plaintiff's standing to maintain this action.

Section 202(d) of the Act provides in pertinent part:

> "Every child . . . of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, . . .
>
> (C) was dependent upon such individual—
>
> • • • • • • •
>
> (ii) if such individual has died, at the time of such death, . . .
>
> • • • • • • •
>
> shall be entitled to a child's insurance benefit for each month, beginning with the first month . . . in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—
>
> (D) the month in which such child dies or marries,
>
> (E) the month in which such child attains the age of 18, but only if he (i) is not under a disability

> . . . at the time he attains such age, and (ii) is not a full-time student during any part of such month,
>
> (F) if such child was not under a disability . . . at the time he attained the age of 18, the earlier of—
>
> (i) the first month during no part of which he is a full-time student, or
>
> (ii) the month in which he attains the age of 22, ..."

Section 202(j) of the Act provides in pertinent part:

> "An individual who would have been entitled to a benefit under subsections . . . [d] of this section for any month . . . had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month."

On January 22, 1977, plaintiff filed an application for CIB. The application appears in the record at pages 60-63. To Question 20, "Has anyone ever before filed an application with the Social Security Administration for monthly benefits on behalf of any child in Item 13?," plaintiff responded, "No." (T.R. 62.) Plaintiff mentioned only one child in the CIB application. Under the provisions of Section 202(j), *supra,* the Secretary awarded 12 months retroactive benefits to the child. We again face the inconsistency between plaintiff's unambiguous testimony that he did not file a claim in 1967 and his counsel's assertion that he must have else there would have been no records to be destroyed. The inescapable conclusion which the Court reaches is that no matter what version is correct, plaintiff's infant child has received all the benefits to which she could conceivably be entitled.

Any claim by the other children for CIB would be barred at this time. From the record it appears that none of them has filed an application even as of this date. In conclusion, the Court would agree with plaintiff that the Act as written at the time of the wage earner's death was constitutional. *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 95 S. Ct. 1225 (1975). *See also, Yates* v. *Califano,* 471 F. Supp. 84 (W.D. Ky. 1979). Congress, however, has removed the constitutional impediment and whether the amendment should be applied retroactively is of no moment.

Defendant's motion for summary judgment on the claims of the plaintiff against her for surviving child's insurance benefits will be granted, and an appropriate Order has been entered this 18th day of January, 1980.

Entered: January 18, 1980

/s/ Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 79-0253-L(B)

VERNON F. HEPKE - - - - - - - *Plaintiff*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare - - - *Defendant*

ORDER

For the reasons set forth in the Memorandum filed this day,

IT IS ORDERED that the motion of the defendant, Patricia Roberts Harris, Secretary of Health, Education and Welfare, for summary judgment on the claims of the plaintiff, Vernon F. Hepke, be and it hereby is granted, and the motion of the plaintiff for summary judgment on his claim against the defendant be and it hereby is denied.

There is no just reason for delay, and this is a final and appealable Order.

This 18th day of January, 1980.

(s) Thomas A. Ballantine, Jr.
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 79-0253-L(B)

VERNON F. HEPKE - - - - - - - *Plaintiff*

v.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare - - - *Defendant*

ORDER

On motion of PLAINTIFF to amend the final Order and Memorandum entered by this Court on January 18, 1980, and the Court being sufficiently advised,

IT IS ORDERED that the third sentence of the second literary paragraph on page 5 of said Memorandum, as embodied in the Court's final Order of January 18, 1980, is amended to read as follows: "In conclusion, the Court would agree with Plaintiff that the Act as written at the time of the wage earner's death was unconstitutional". In all other respects the Memorandum and Order of January 18, 1980, are hereby affirmed.

IT IS FURTHER ORDERED that there is no just reason for delay and this is a final and appealable Order.

Entered this 20th day of February, 1980.

(s) Thomas A. Ballantine, Jr.
United States District Judge

APPENDIX 6

[LETTERHEAD OF DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE]

DECISION

In the case of	Claim for
Vernon F. Hepke (Claimant)	Lump-Sum Death Payment and Surviving Child's Insurance Benefits
Dorothy M. Hepke (Deceased) (Wage Earner) (Leave blank if same as above)	406-12-3678 (Social Security Number)

STATEMENT OF ADMINISTRATIVE PROCEEDINGS

On August 21, 1976, the claimant indicated his intent to file a claim for lump-sum death payment and a claim for child's insurance benefits, based upon the account of Dorothy M. Hepke, deceased wage earner. On January 24, 1977, the claimant filed an application for surviving child's insurance benefits on behalf of Lea A. Hepke, daughter of deceased wage earner. Benefits were granted, with date of entitlement beginning December 1975. The claimant also filed an application for lump-sum death payment on January 24, 1977. This application was denied initially and by Reconsideration Determination dated February 9, 1978. A request for hearing was timely filed.

ISSUES AND APPLICABLE LAW

The issues to be determined are (1) whether the claimant is entitled to a lump-sum death payment under section 202(i) of the Social Security Act and (2) whether Lea A. Hepke is entitled to surviving child's insurance benefits beginning prior to December 1975, under sections 202(d) and 202(j) of the Social Security Act.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the exhibits described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

In a report of telephone contact with the claimant on December 21, 1976, he said he came into the office in 1967 to file for lump sum death payment. The man he talked to came back and told him within five minutes that wage earner wasn't insured. He said he was told by someone in the office that this was impossible to check quarters of coverage in five minutes. (Exhibit 1).

A statement signed by the claimant on January 22, 1977 states as follows:

> "I came into the Social Security Office on 5th Street here in Louisville in 1967 to file for the burial payment on my deceased wife's record, and to file for survivor's benefits for my daughter. The Social Security Representative with whom I spoke asked me a few questions, left for a few minutes, and when he came back he told me my wife had not paid in enough quarters for any payment to be made. He did not take a claim. I told him that my wife had worked several years under Social Security but he still said she was ineligible. I don't know how he could have known this at the time of our interview. I had never been into the office (or called in), and my wife had never filed a claim for any Social Security benefit.
>
> A friend said I ought to check into this again so that's why I'm now filing". (Exhibit 13).

In a later statement signed by the claimant on June 8, 1977, he says that he and his daughter Janice Hepke Townsend, went to the Louisville, Kentucky district office on October 30, 1967 or October 31, 1967. He says that he did not sign any papers then to file for the death payment nor the children as he was told his wife lacked one quarter for insured status. He said he did not know with whom he spoke, but it was a middleaged man in a white shirt. He stated he had gone to the office with the intention of filing, but did not, because of the misinformation he received. He felt that it was not his fault that he didn't file for the death payment within two years nor for the children until 1976. (Exhibit 14).

In a statement signed by Janice M. (Hepke) Townsend, claimant's daughter, dated June 7, 1977, she says, to the best of her recollection, it was one day during the week of October 30, 1967 that she and her father visited the Louisville Social Security Office to inquire about burial fees and benefits. She says a man asked her father questions pertaining to her mother's work record, social security number, children and ages, etc. He took the information and walked into a back room. A short time later, he came back and told her father that her mother lacked one quarter of coverage in order to qualify. She said her dad found this hard to believe and asked the man to double check. The man did. Returning, he said that her mom's work was one quarter short. Trusting that he had the facts correct, they took his word for it and left. (Exhibit 15).

At the hearing, the claimant reiterated his prior statements with respect to visiting the social security office and being told that his wife was a "quarter short". He stated that he had four minor children at that time. Their dates of birth were given as September 4, 1959, August 22, 1955, August 22, 1953 and June 19, 1951. He stated that he definitely did not sign anything while at the social security

office and never received any check or written notice from the social security office, prior to filing the present applications.

The wage earner's earnings record shows that she has 29 quarters of coverage. She needs only 16 quarters of coverage to be "fully insured". Thus, she had sufficient quarters of coverage for a lump-sum death payment, if all other requirements were met. (Exhibit 10).

To be a "currently insured individual", the wage earner must have not less than 6 quarters of coverage during the 13 quarter period beginning with the last quarter of 1964 and ending with the last quarter of 1967. During such period, she had only 3 quarters of coverage. Thus, she was not a "currently insured individual". (Exhibit 10).

At the time of wage earner's death in October 1967, section 202(d) of the Social Security Act, pertaining to child's insurance benefits, provided that a child was deemed dependent on his mother if she was "currently insured". If she was not currently insured, then only if she was contributing one-half of the child's support. There is no contention by claimant that wage earner was currently insured or that she was contributing one-half of any child's support at the time of her death. However, section 202(d) of the Act was amended, effective January 2, 1968, to provide that a child shall be deemed dependent upon his father or mother at the time of death, unless such individual was not living with or contributing to the support of such child. In other words, the requirements with respect to the deceased wage earner's being currently insured or contributing one-half of the child's support were deleted. Thus, on and after January 2, 1968, the wage earner's fully insured status and the fact that the children were living with her at the time of her death met the requirements for payment of child's insurance benefits, provided an application was completed and filed.

Although the claimant states that he only made one inquiry or visit to the social security office in late October 1967 and did not sign anything whatsoever at that time, records show that some kind of application was filed on October 30, 1967, based upon the wage record of Dorothy M. Hepke, who died October 22, 1967. The file pertaining to such claim was sent to the Federal Records Center in February 1969, and such records were destroyed in May 1974. (Exhibit 10). Section 202(d) of the Act, presently and in October 1967, requires the filing of an application for child's insurance benefits. Section 202(i) of the Act, presently and in October 1967, requires the filing of an application for a lump-sum death payment. Section 404.-613 of Social Security Regulations No. 4 provides that where an individual files a written statement with the Administration that indicates an intention to file a claim for monthly benefits or lump-sum death payment and such statement bears his signature, the filing of such written statement is considered to be the filing of an application for such purposes, provided the individual executes a prescribed application form that is filed with the Administration within his lifetime, or within 6 months from the date of notice to file such prescribed application form.

The claimant's statements about what occurred in October 1967 are not compatible with the other evidence of record, meager though it is, concerning his claim. His statements are also incompatible with the usual procedures followed by the Social Security Administration in handling such claims. Because the file pertaining to the claimant's application filed October 30, 1967 has been destroyed, it is impossible to determine, with any degree of certainty, just what transpired. The records do show that claimant filed some type of application on October 30, 1967, based on the account of the wage earner who died October 22, 1967. Presumably it was an application for a lump-sum death

payment or for child's insurance benefits, or both. Any application for such benefits at that time would be considered as an intention to file for any benefits payable, based on the deceased wage earner's account, unless otherwise indicated. Thus, it appears from the available records that claimant did sign one or more applications on October 30, 1967. It was, and is, the procedure of the Social Security Administration to retain records pertaining to inquiries for only short periods, if no application is filed. Only those claims that have been adjusted (where an application has been filed and a final determination made) are sent to the Federal Records Center. Thus, it follows that in the course of disposition of the application filed on October 30, 1967, the claimant would have received a written notice of the determination. The undersigned is aware of no procedure or method, existing now or in October 1967, whereby any representative at the social security district office can obtain an earnings record of an individual in five minutes, fifteen minutes, or in a few hours. Earnings records are usually requested by teletype and are not received in the district office until several days after the request. The claimant says that he talked to the social security office only on the one occasion when he went into the office and that his wife had never filed a claim for any social security benefits. If she had filed a claim for benefits, there possibly could have been an earnings record available in the district office from which a representative might have concluded that she was a "quarter short", since her last reported earnings were in the third quarter of 1966. If the claimant had previously contacted the social security district office shortly after his wife's death on October 22, 1967, her earnings record might have been requested at that time, and it possibly could have been received in the social security district office by October 30, 1967. However, it would be very unusual to receive an earnings record, pursuant to

such request, in a period of eight days or less, even if claimant had contacted the social security district office prior to October 30, 1967.

The claimant's lack of knowledge of the change in the law pertaining to the child's insurance benefits, in January 1968, resulted in a great loss of benefits to his four minor children. For this reason, the undersigned has agonized over the conflict between the claimant's statements of what transpired on October 30, 1967 and the written evidence and procedures of the Social Security Administration in handling such claims. Although the claimant states that he did not file any application or sign anything when he talked to the social security representative in October 1967, the evidence shows that an application was filed on October 30, 1967, was sent to the Federal Records Center in February 1969, and was destroyed in May 1974. This would indicate that an application was filed and that there had been a final determination made with respect to such claim. Based upon the law pertaining to child's insurance benefits at that time, any claim therefore would have been denied. Whether the application filed on October 30, 1967 was for a lump-sum death payment cannot be determined. If it was for a lump-sum death payment, the determination with respect thereto would be final and binding, even if the present application was considered as a request to reopen the final determination on such prior application (section 404.957 of Social Security Regulations No. 4). If the application filed October 30, 1967 was not for a lump-sum death payment, then the present application can prevail only if the claimant establishes good cause for not filing such application within two years following the death of the wage earner (sections 404.616 and 404.617 of Social Security Regulations No. 4).

After careful consideration of all the evidence including the claimant's testimony and allegations, the undersigned is

not persuaded that claimant has established good cause for late filing of his application for a lump-sum death payment (even if no such prior application was filed), or that any action by the Social Security Administration prevented the claimant from filing for child's insurance benefits under the law existing on and after January 1, 1968.

FINDINGS

The Administrative Law Judge has carefully considered all the evidence and makes the following findings:

1. Dorothy M. Hepke, the deceased wage earner, died on October 22, 1967, a fully-insured individual, but not a currently insured individual.

2. Vernon F. Hepke filed an application for lump-sum death payment on January 24, 1977, pursuant to an intent to file dated December 21, 1976.

3. Vernon F. Hepke, on behalf of Lea A. Hepke, filed an application for surviving child's insurance benefits on January 24, 1977, pursuant to an intent to file dated December 21, 1976.

4. The record shows that claimant filed some type of application, or applications, on October 30, 1967, based upon the account of Dorothy M. Hepke; that such records were sent to the Federal Records Center in February 1969, and that such records were destroyed in May 1974.

5. Lea A. Hepke is entitled to child's insurance benefits beginning with December 1975 (but not prior thereto), based upon the application deemed filed on December 21, 1976.

6. The evidence fails to establish good cause for the late filing of claimant's application for lump-sum death payment, deemed filed on December 31, 1976.

DECISION

It is the decision of the Administrative Law Judge that, based upon the application deemed filed on December 21, 1976, Lea A. Hepke is entitled to child's insurance benefits beginning with the month of December 1975, but not prior thereto.

It is the further decision of the Administrative Law Judge that, based upon the application deemed filed on December 21, 1976, Vernon F. Hepke is not entitled to a lump-sum death payment.

(s) Lehman Sadler
Administrative Law Judge
Bureau of Hearings & Appeals, SSA
Room 600, Bank of Louisville Bldg.
510 West Broadway
Louisville, Kentucky 40202

Date: October 31, 1978

APPENDIX 7

42 U.S.C. § 402

"(d) Child's insurance benefits.

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and either (i) had not attained the age of eighteen or (ii) was under a disability (as defined in section 423(c) of this title) which began before he attained the age of eighteen, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: such child dies, marries, is adopted (except for adoption by a step-

parent, grandparent, aunt, or uncle subsequent to the death of such fully or currently insured individual), or attains the age of eighteen and is not under a disability (as defined in section 423(c) of this title), which began before he attained such age. Entitlement of any child to benefits under this subsection shall also end with the month preceding the third month following the month in which he ceases to be under a disability (as so defined) after the month in which he attains age eighteen. . . ."

• • •

"(3) A child shall be deemed dependent upon his father or adopting father at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) of this title shall, if such individual is the child's father, be deemed to be the legitimate child of such individual."

• • •

"(5) A child shall be deemed dependent upon his natural or adopting mother at the time specified in paragraph (1)(C) of this subsection if such mother or adopting mother was a currently insured individual. A child shall also be deemed dependent upon his natural or adopting mother, or upon his stepmother, at the time specified in paragraph (1)(C) of this subsection if, at such time,

(A) she was living with or contributing to the support of such child, and (B) either (i) such child was neither living with nor receiving contributions from his father or adopting father, or (ii) such child was receiving at least one-half of his support from her.

APPENDIX 8

20 CFR

"§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905 (d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910) unless such determination is to the effect that a deduction, or, except in disability claims, a termination, is to be made and such determination is based only upon facts reported to the Administration by the party to the determination. Notice of termination because of cessation of disability shall inform the party to the determination of the right to reconsideration, even where the termination was based on a report to the Administration by the

party to the determination that his condition improved or that he returned to work. . . ."

"§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910-404.916, or it is revised in accordance with § 404.956."

"§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917."